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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-252

Filed: 15 August 2017

Forsyth County, Nos. 13 CRS 50254-55, 50262-67, 50269-70, 50559-63

STATE OF NORTH CAROLINA

v.

ERIC NOLAN SELLERS

Appeal by defendant, by petition for writ of certiorari, from judgments entered 22 April 2016 by Judge John O. Craig, III in Forsyth County Superior Court. Heard in the Court of Appeals 31 July 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Ryan C. Zellar, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

CALABRIA, Judge.

Eric Nolan Sellers (“defendant”) appeals by petition for writ of certiorari from judgments entered upon his *Alford* plea to various property offenses. We allow defendant’s petition and affirm the trial court’s judgments, but remand for correction of clerical errors appearing therein.

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I. Background

On 22 April 2016, defendant entered an *Alford* plea to thirty-five charges of property offenses, including breaking and entering; larceny after breaking and entering; larceny of a chose in action; possession of stolen goods; safecracking; obtaining property by false pretenses; uttering a forged instrument; breaking and entering a motor vehicle; financial card theft; and misdemeanor larceny. In accordance with the plea agreement, the trial court consolidated the offenses into three Class H felony judgments and sentenced defendant to three consecutive terms of 8 to 19 months' imprisonment.¹

On 5 May 2016, defendant filed with the trial court a handwritten, *pro se* notice of appeal. On 4 April 2017, defendant's appellate counsel filed with this Court a petition for writ of certiorari, acknowledging that defendant's notice "did not identify the judgments he was appealing by case number" and "did not indicate that he was appealing to this Court." See N.C.R. App. P. 4(a)(2). In our discretion, we allow defendant's petition for writ of certiorari.

II. *Anders* Review

Counsel appointed to represent defendant on appeal has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), indicating that after

¹ The trial court initially entered judgments sentencing defendant to two terms of 8 to 10 months' imprisonment and one term of 8 to 19 months' imprisonment, including the nine months of post-release supervision in only one judgment. On 4 May 2016, the court entered amended judgments correcting the error.

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close examination of the record and relevant law, she “is unable to identify an issue with sufficient merit to support a meaningful argument for relief on direct appeal.” She asks this Court to conduct its own review of the record for possible prejudicial error. Counsel has filed documentation with the Court showing that she has complied with the requirements of *Anders* and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising defendant of his right to file written arguments with the Court and providing him with a copy of the documents pertinent to his appeal. Defendant has not filed any written documents on his own behalf with this Court, and a reasonable time for him to do so has expired.

The State has filed a motion to dismiss defendant’s appeal. The State argues that defendant does not have an appeal of right because he pleaded guilty and was sentenced in the presumptive range. Given that defendant’s appellate counsel has filed an *Anders* brief and requested this Court to review the record for any prejudicial errors, we deny the State’s motion to dismiss.

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit exist. By virtue of his guilty plea, defendant’s right of appeal is limited to the sentencing issues set forth in N.C. Gen. Stat. § 15A-1444(a1) and (a2) (2015). Here, defendant stipulated to his prior convictions and the factual basis for his plea. Furthermore, defendant received the specific presumptive-

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range sentences specifically provided for in his plea agreement. Therefore, we find no prejudicial error.

Defendant notes, and the State concedes, that the judgment entered in file number 13 CRS 50559 contains a clerical error. We agree. The judgment lists three felony convictions for possession of stolen goods, while defendant actually pleaded guilty to one felony count and two misdemeanor counts of this offense. Additionally, we note that although the trial court's judgments reflect that defendant pleaded guilty, they do not indicate that his guilty plea was entered "pursuant to *Alford*."

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and internal quotation marks omitted). Accordingly, we affirm the trial court's judgments but remand to the trial court for the limited purpose of correcting the aforementioned clerical errors.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judge TYSON concurs.

Judge MURPHY concurs in a separate opinion.

Report per Rule 30(e).

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MURPHY, Judge, concurring.

I agree that it is proper to affirm the trial court’s judgments but remand to the trial court for the limited purpose of correcting the clerical errors discussed by the Majority. I write separately to note that during my review I found a jurisdictional error resulting from a facially deficient indictment. *See State v. Mather*, 221 N.C. App. 593, 595, 728 S.E.2d 430, 432 (2012) (explaining that when the indictment fails on the face of the record to charge an essential element, an indictment is fatally defective and must be vacated). Specifically, the indictments charging Defendant with larceny of a chose in action name the chose in action as “a checkbook” or “a checkbook containing individual checks,” even though our Court has clearly held that “theft of a blank check does not support a claim for larceny of a chose in action.” *See State v. Grier*, 224 N.C. App. 150, 153, 735 S.E.2d 434, 437 (2012). This is because a chose in action is pertinently defined as “[a] proprietary right in personam[.]” *Grier*, 224 N.C. App. at 153, 735 S.E.2d at 437 (quoting Black’s Law Dictionary 234 (7th ed. 1999)). Thus, larceny of a chose in action can only occur when “any person shall feloniously steal, take and carry away, or take by robbery, any bank note, check *or other order for the payment of money* . . . [.]” N.C.G.S. §14-75 (2015) (emphasis added). Neither blank checks nor a blank checkbook can constitute an order for the payment of money.

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Murphy, J., concurring

Despite finding this error during my *Anders* review, I may not vote to vacate based on it because “[w]hile it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division only if and when the case is properly pending before the appellate division.” *State v. Absher*, 329 N.C. 264, 265 n.1, 404 S.E.2d 848, 849 n.1 (1991), *accord State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003). Therefore, as discussed by the Majority, the only issues properly before us are those detailed in N.C.G.S. § 15A-1444(a1) and (a2) (2015), which do not permit us to review jurisdiction. The writ of certiorari allowed by this Court does not expand our inquiry into the jurisdictional error because a petition for writ of certiorari may only be allowed in limited circumstances, *see* N.C. R. App. P. 21(a)(1) (2015) (listing the circumstances where the appellate courts may grant writ), none of which apply here.

Nonetheless, Defendant is not without remedy for the jurisdictional error. If he chooses to upset his plea negotiations with the State, *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993) (“[I]f defendant elects not to stand by his portion of the plea arrangement, the State is not bound by its agreement[.]”) (describing *State v. Fox*, 34 N.C. App. 576, 579, 239 S.E.2d 471, 473 (1977)), he may seek a motion for appropriate relief that the trial court lacked jurisdiction over his person or the subject matter of the proceedings. N.C.G.S. § 15A-1415(b)(2) (2015).

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